No. __-_____

IN THE

# Supreme Court of the United States

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KEVIN PATRICK MALLORY,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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**November 28, 2022**

## QUESTION PRESENTED

Whether, before a court may order a "partial closure" restricting the public's ability to see or hear evidence or questioning that is accessible by the parties, the court, and the jury, the Sixth Amendment right to a public trial requires courts to make adequate findings that an overriding interest supports the restriction and that the restriction is no broader than necessary after consideration of reasonable alternatives, in accordance with *Waller v. Georgia*, 467 U.S. 39, 48 (1984)?

## PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

## RELATED CASES

(1) *United States v. Mallory*, No. 1:17-cr-00154-TSE-1, U.S. District Court for the Eastern District of Virginia. Judgment entered May 17, 2019.

(2) *United States v. Mallory*, No. 19-4385, U.S. Court of Appeals for the Fourth Circuit. Judgment entered July 11, 2022.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Kevin Patrick Mallory respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 40 F.4th 166, and appears in Appendix A to this petition. Pet. App. 1a-16a.[1] That court's order denying rehearing en banc is unpublished and appears in Appendix B. Pet. App. 17a.

## JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court issued its opinion and judgment on July 11, 2022. A timely petition for rehearing en banc was denied by the court of appeals on August 29, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ….

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[1] "Pet. App." refers to the appendix attached to this petition. "C.A.J.A." refers to the unclassified joint appendix filed in the court of appeals, while "C.A.C.J.A." refers to the classified appendix filed in the court of appeals.

## INTRODUCTION

Violations of the right to a public trial constitute one of a small handful of errors classified as "structural"—defects that are so intrinsically harmful as to require automatic reversal. *Waller v. Georgia*, 467 U.S. 39, 48 (1984). This case raises the question of whether the constitutional test established in *Waller* applies to a "partial closure" in which a court admitted certain defense evidence at trial and made it accessible to the court, the parties, and the jury, but otherwise kept it sealed. The defense was thereby precluded from using the words in the evidence to question witnesses or make arguments in open court—and the public was prevented from understanding the evidence.

In *Waller*, this Court established a demanding test applicable to the requested closure of a public hearing:

> The party seeking to close the hearing must [1] advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

467 U.S. at 48 (Sixth Amendment) (citing *Press-Enter. Co. v. Super. Ct. of Calif.*, 464 U.S. 501, 508 (1984) (First Amendment)).[2] The Court emphasized that "broad and

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[2] "The extent to which the First and Sixth Amendment public trial rights are coextensive is an open question." *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam). That said, "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public," *Waller*, 467 U.S. at 46, given that the text protects not only "the rights of the public at large, and the press," but also "the defendant against unjust conviction." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017). Courts apply the same legal standard to closures under either one.

general" concerns are insufficient to justify a restriction on an open and public trial. *Id.*

*Waller* states that the four-factor test applies to "any closure [of a criminal trial]," 467 U.S. at 47, and the decision "did not distinguish between complete and partial closures." *United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015). Indeed, public access to criminal proceedings ensures accountability and fairness *because* of the public's ability to see and understand the proceedings. *Press-Enter. Co. v. Super. Ct. of Calif.*, 464 U.S. 501, 508-509 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-606 (1982); *Waller*, 467 U.S. at 45-46; *In re Oliver*, 333 U.S. 257, 270 (1948).

Formally opening the courtroom doors to the public while simultaneously restricting its ability to understand "the actual proof at trial," *Waller*, 467 U.S. at 44, thus implicates the core of the Sixth Amendment right. Such restrictions must be subject to the demanding and fact-specific test set forth in *Waller*.

Yet whether and how *Waller* applies to "partial" restrictions on the public's ability to see and hear public hearings has deeply divided lower courts. In cases where public access to criminal proceedings is limited solely to audio or visual observation of the proceedings, lower courts impose entirely inconsistent standards as to whether and in what way such restrictions are subject to constitutional scrutiny. Some courts hold that "partial" restrictions on public access to hearings constitute closures subject to the *Waller* test. *See United States v. Allen*, 34 F.4th 789 (9th Cir. 2022) (pandemic restriction limiting public to audio access to hearing and trial constitutes complete closure subject to *Waller* test); *In re Petitions of Memphis Pub. Co.*, 887 F.2d 646, 648

(6th Cir. 1989) (use of white noise during voir dire questioning constitutes closure subject to four-part constitutional test); *United States v. Lucas*, 932 F.2d 1210, 1217 (8th Cir. 1991) (affirming trial court's conclusion that use of screen during testimony by undercover officer was justified by overriding interests after considering alternatives).

The Fifth and Eleventh Circuits, by contrast, hold that only a "substantial reason" is required to order a "partial closure" of court proceedings. *United States v. Ansari*, 48 F.4th 393, 402 (5th Cir. 2022) (COVID-19 measure limiting public to audio and video livestream supported by substantial reason); *United States v. Brazel*, 102 F.3d 1120, 1155 (11th Cir. 1997) ("Assuming a partial closure, a 'substantial reason' would be needed to justify it."); *but cf. United States v. Simmons*, 797 F.3d 409, 414 (6th Cir. 2015) (noting in context of exclusion of some but not all members of the public, "[a]ll federal courts of appeals that have distinguished between partial closures and total closures modify the *Waller* test so that the 'overriding interest' requirement is replaced by requiring a showing of a 'substantial reason' for a partial closure, but the other three factors remain the same").

Finally, high courts in the District of Columbia, Massachusetts, and Ohio hold that as long as the courtroom remains open, restrictions on the public's ability to perceive visual or auditory information are not subject to the *Waller* test. *See Blades v. United States*, 200 A.3d 230, 241 (D.C. 2019) ("use of the husher during individual-juror voir dire did not constitute closure or partial closure of the courtroom, but instead was a 'reasonable alternative [ ] to closing the proceeding'"); *Commonwealth v. Colon*, 121 N.E.3d 1157, 1170 (Mass. 2019) ("Although the public cannot hear what

is being said, the ability to observe the process 'furthers the values that the public trial right is designed to protect.'"); *State ex rel. Law Office of Montgomery Cty. Pub. Def. v. Rosencrans*, 856 N.E.2d 250, 255 (Ohio 2006) (per curiam) (no public trial right to audio system to permit public to hear traffic court proceedings); *cf. Rodriguez v. Miller*, 439 F.3d 68, 75-76 (2d Cir. 2006) ("whether the use of a screen is an 'alternative to closure' or a 'partial closure' … is significant because of how it may affect the *Waller v. Georgia* analysis."), *vacated on other grounds*, 549 U.S. 1163 (2007).

Although this Court addressed aspects of the right to a public trial in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), and *Presley v. Georgia*, 558 U.S. 209 (2010), "state and federal courts are in need of further guidance" as to the scope of the Sixth Amendment right to a public trial. *Smith v. Titus*, 141 S. Ct. 982, 982 n.1 (2021) (Sotomayor, J., dissenting from denial of certiorari). This is particularly so in the context of "partial closures" that limit the public's ability to see or understand criminal proceedings.

## STATEMENT

Petitioner is a former CIA case officer who was convicted of conspiracy to commit espionage in violation of 18 U.S.C. § 794(c) and making false statements to FBI agents in violation of 18 U.S.C. § 1001. The case began in February 2017 when Petitioner was contacted on a professional networking site by a person purporting to be a Chinese business recruiter. Petitioner travelled to China twice in the ensuing months at the ostensible invitation of a Chinese think tank.

Evidence at trial established that Petitioner had a small number of classified documents at his home dating to his employment with a U.S. intelligence agency, that he had been given a phone by his Chinese contacts with the ability to secretly send encrypted communications and documents, and that he had transmitted two documents he created that contained classified information. Pet. App. 4a-6a, *United States v. Mallory*, 40 F.4th 166, 169-170 (4th Cir. 2022). His principal defenses at trial were that the information he transmitted to the Chinese agents was already made public by U.S. government sources, and he did not have criminal intent because he disclosed his contact with foreign agents and the phone to the CIA.

Before trial, the trial court ruled that although a "limited number of classified documents" would be introduced by the government under seal and shielded from public view, the "defendant w[ould] be given latitude to cross-examine witnesses using items in the public record to show that the [classified] information contained in the documents is widely known and not a closely-held government secret." C.A.C.J.A. 71-72. Information already in the public domain, the district court ruled, would remain public at the trial. C.A.C.J.A. 109-110.

At trial, however, without reviewing the public-source defense exhibits that were offered and later admitted, the trial court over objection reversed its prior ruling and precluded "the public, unlike members of the jury, [from] learn[ing] about the specific contents of these defense exhibits." Pet. App. 11a, 40 F.4th at 176. The trial court's switch to sealing defense evidence occurred in a sealed sidebar, without a publicly issued order. C.A.C.J.A. 222-234. Specifically, the court stated that "the use of the [public source] document(s) in open court … would allow people to connect the

dots and disclose classified information." C.A.C.J.A. 233. It thus prohibited counsel from questioning witnesses using the specific language contained in the admitted defense evidence. C.A.C.J.A. 234. Petitioner was convicted at trial and sentenced to twenty years in prison.

Following his conviction, Petitioner appealed to the Court of Appeals for the Fourth Circuit. That court affirmed the district court's decision in a published opinion on the ground that, because the public was not physically excluded from the courtroom, shielding evidence from public view "was far from effecting a complete closure of the proceedings to the public." Pet. App. 11a, 40 F.4th at 176. The court of appeals noted that "members of the public were able to hear, repeatedly, that the exhibits were public government documents" that referenced the means of intelligence collection contained in the classified documents, and that "they helped form the basis for the defense expert's opinion that the [transmitted information] did not contain national defense information." *Id.* "Thus," the court concluded, "while members of the public, unlike members of the jury, did not learn about the specific contents of these defense exhibits," those present in the courtroom could observe that Petitioner "was being 'fairly dealt with and not unjustly condemned' in a secret proceeding." *Id.*

The court of appeals also held that sealing the defense evidence, precluding the defendant from introducing these defense exhibits in public, and preventing counsel from using words in the public documents to ask questions was justified by the trial court's broad and general finding that introducing these "public-source documents 'in open court … would allow people to connect the dots' and would thus be likely to

'disclose [the] classified information that the court had previously determined had to be protected" from disclosure. Pet. App. 12a, 40 F.4th at 177.

Notably, that was the whole point of the defense evidence; it was relevant and admissible to show that the information Petitioner transmitted to a foreign agent had already been made public by the U.S. government, and thus was not "national defense information" for purposes of the Espionage Act. *See Gorin v. United States*, 312 U.S. 19, 28 (1941) ("Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can … be no reasonable intent to give an advantage to a foreign government.")).

Prior to closing the evidence from public view, the trial court did not review the defense exhibits, did not consider reasonable alternatives, did not narrowly tailor its order, and did not issue a public ruling ordering the closure. In sum, it did not apply the four-part *Waller* test before precluding the defense exhibits from public view. *Cf. Presley v. Georgia*, 558 U.S. 209, 213 (2010) ("*Waller* provided standards for courts to apply *before* excluding the public from any stage of a criminal trial ….") (emphasis added).

The Fourth Circuit denied a petition for en banc rehearing on August 29, 2022. Pet App. 17a.

## REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision is wrong and conflicts with this Court's precedents addressing the right to a public trial. It also involves a deep and abiding conflict among lower courts regarding whether the four-part *Waller* test applies to partial restrictions on public access to public proceedings. This issue is

extraordinarily significant with respect to one of the most basic constitutional protections, particularly in the wake of widespread restrictions on public access to court proceedings during the COVID-19 pandemic. Because this case directly and cleanly presents the issue of whether partial restrictions on public access to a criminal trial are subject to the constitutional test set out in *Waller v. Georgia*, certiorari is warranted.

## I. The Fourth Circuit Was Wrong That a General Concern About the Disclosure of Sensitive Information Justifies the Sealing of Admitted Evidence in a Criminal Trial.

This Court's precedents plainly establish both that limiting the public's ability to understand trial evidence strikes at the heart of the Sixth Amendment and that broad and general concerns about the disclosure of sensitive information are insufficient to warrant restricting public access to a criminal trial. *Waller v. Georgia*, 467 U.S. 39, 48-49 (1984) (holding that "broad and general" concerns about revealing sensitive information in pretrial motions hearing insufficient to warrant closure); *Presley*, 558 U.S. at 215 (finding trial court's "broad concerns" about the risk of jurors "overhearing prejudicial remarks" insufficient "to override a defendant's constitutional right to a public trial"). The Fourth Circuit's ruling allows the government to circumvent these holdings in cases characterized as "partial" closures.

### A. Allowing the Public to Enter the Courtroom While Denying Its Ability to Understand Trial Evidence or Questioning Undermines the Sixth Amendment Guarantee of a Public Trial.

The practice of requiring criminal trials to occur in public dates to well before the founding, and is grounded in centuries of "unbroken, uncontradicted history."

*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980); *In re Oliver*, 333 U.S. 257, 266 (1948) ("This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage."). Accordingly, the settled rule in this country is that "[a] trial is a public event. What transpires in the court room is public property." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (citation omitted).

The core of the common law right to a public trial underlying the Sixth Amendment guarantees public access to the presentation of evidence and testimony for and against an accused at a trial. *See In re Oliver*, 333 U.S. at 270 (noting that "contemporaneous review" by the public in "every criminal trial" constitutes a "restraint on possible abuse of judicial power"). Blackstone explained that "open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination before an officer or his clerk." 3 W. Blackstone, Commentaries on the Laws of England 373 (1768); *see also* Matthew Hale, The History and Analysis of the Common Law of England 258 (London, J. Nutt 1713) ("evidence is given 'in the open court and in the presence of the parties, counsel, and all by-standers'").

Likewise, the Court's precedents confirm that the Sixth Amendment ensures public access to proceedings and rulings that involve the actual evidence at stake in a criminal trial. In *Waller*, the Court held that the Sixth Amendment right to a public trial guarantees public access to a hearing before trial to address a motion to "suppress wrongfully seized evidence." *Waller*, 467 U.S. at 46. It thus necessarily encompasses a right for the public to see and understand the "actual proof at trial."

*Id.* at 44; *accord Presley*, 558 U.S. at 212 (noting that "the Sixth Amendment right to a public trial extends beyond the actual proof at trial").

In sum, the Sixth Amendment ensures not only that the public may visibly observe criminal proceedings, but also that it can understand the evidence and testimony and thereby engage in "contemporaneous review" of such proceedings. *In re Oliver*, 333 U.S. at 270. That is because the constitutional right to a public trial guarantees that the public has the ability to evaluate independently both the evidence presented and the fairness of the proceedings. *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979). The right to a public trial thus entails the right "to *hear*, *see*, and communicate observations" of the proceedings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (plurality) (emphasis added).

Mere presence in the courtroom, without the ability to understand or view the evidence presented, prevents the public from performing this function. Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 Harv. L. Rev. 2173, 2193-2194, 2228 (June 2014) (exclusion of public by "clos[ing] courtrooms" or even "keeping the volume too low for the audience to hear" results in "both defendants and the local community los[ing] out on an opportunity to promote fairness and accountability"). For this reason, the Fourth Circuit's conclusion that the sealing of defense-introduced evidence designed to establish innocence did not constitute a "sanctionable closure of the courtroom," Pet. App. 12a, 40 F.4th at 177, is contrary to both *Waller* and the common law history supporting the right to a public trial.

### B. This Court's Precedents Establish That Broad and General Concerns Involving the Disclosure of Sensitive Information Are Insufficient to Justify Restricting Public Access to Trial Evidence.

The Fourth Circuit's conclusion that a general concern about the disclosure of sensitive information was sufficient to seal defense-introduced evidence, Pet. App. 12a, 40 F.4th at 177, also directly contradicts this Court's precedents. In *Waller*, the trial court closed a suppression hearing "to all persons other than witnesses, court personnel, the parties, and the lawyers" based upon the prosecution's request to protect the privacy of certain individuals recorded in wiretap evidence and to permit the evidence to be "used in future prosecutions." 467 U.S. at 42. But the Court found this rationale insufficient. Specifically, the Court stated that:

> [T]he trial court's findings were broad and general, and did not purport to justify closure of the entire hearing. The court did not consider alternatives to immediate closure of the entire hearing: directing the government to provide more detail about its need for closure, in camera if necessary, and closing only those parts of the hearing that jeopardized the interests advanced.

*Waller*, 467 U.S. at 48-49.

Given the central importance of the public trial right, lawful closures to accommodate "other rights or interests, such as the defendant's right to a fair trial or *the government's interest in inhibiting disclosure of sensitive information*" must be "rare, [] and the balance of interests must be struck with special care." *Waller*, 467 U.S. at 45 (emphasis added). Accordingly, the Court held that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that

interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.*

In this case, the trial court did not review the defense evidence prior to sealing it from public view, did not narrowly tailor its ruling or consider alternatives, and did not make any findings beyond a broad and general conclusion that introducing the evidence in open court posed a risk of disclosing information in other sealed evidence that was classified. C.A.C.J.A. 233-234. The Fourth Circuit's conclusion that the sealing of defense evidence from public view was justified by the trial court's broad conclusion that introducing the "public-source documents 'in open court … would allow people to connect the dots' and would thus be likely to 'disclose [the] classified information that the court had previously determined had to be protected" from disclosure, Pet. App. 12a, 40 F.4th at 177, is thus directly contrary to the Court's holding in *Waller*.

Finally, the trial court's failure to apply the *Waller* factors constitutes a structural error under this Court's precedents. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1909 (2017) ("[a] public-trial violation can occur … simply because the trial court omits to make the proper findings before closing the courtroom, even if those findings might have been fully supported by the evidence."); *accord Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 609 n.20 (1982) ("[I]ndividualized determinations are always required before the right of access may be denied.").

## II. Lower Courts Are Divided on Whether Partial Restrictions on Public Access to Criminal Proceedings Are Subject to *Waller*'s Four-Part Test.

Three federal appellate courts are in accord that a "closure" for purposes of the Sixth Amendment is not limited to physically excluding people from a courtroom. The Sixth, Eighth, and the Ninth Circuits have each held that restrictions on the public's ability to see or hear proceedings must be supported by an overriding interest and be narrowly tailored following consideration of alternatives to satisfy constitutional scrutiny. By contrast, in the case of "partial" closures, the Fifth and Eleventh Circuits collapse the constitutional inquiry into the single question of whether a substantial reason supported the restriction imposed. Finally, at least three state courts have found that only physical exclusions constitute a "closure" for purposes of the constitutional right to a public trial.

The Court should grant review to resolve the conflict. Without the Court's intervention, "partial" closures that constitute structural errors in some areas of the country will continue to occur with limited or no constitutional scrutiny in others.

### A. The Sixth, Eighth, and Ninth Circuits Have Held That Limits on Audio or Visual Access Constitute "Closures" Subject to the Four-Part Constitutional Test.

The Sixth Circuit has held that the use of "white noise during voir dire proceedings" so that the public and press could not hear questioning of potential jurors by the court or counsel constituted a closure subject to the four-part test set out in *Press-Enterprise. Co. v. Super. Ct. of Calif.*, 464 U.S. 501 (1984). *In re Petitions of Memphis Pub. Co.*, 887 F.2d 646, 648 (6th Cir. 1989). In addition, the court found that the trial court's general concerns regarding adverse effects of publicity were

"insufficient to justify closure" notwithstanding the presence of the public in the courtroom. *Id.* at 648-49.

Likewise, in *United States v. Lucas*, 932 F.2d 1210 (8th Cir. 1991), the Eighth Circuit measured the constitutionality of the use of a screen during the testimony of an undercover law enforcement officer by whether the trial court made adequate findings of an overriding interest, considered alternatives, and imposed a restriction that was no broader than necessary. *Id.* at 1217. In that case, the court affirmed the district court's use of a screen during the officer's testimony.[3]

Finally, the Ninth Circuit recently held that the "'public trial' guaranteed by the Sixth Amendment is impaired by a rule that precludes the public from observing a trial in person, regardless whether the public has access to a transcript or audio stream." *United States v. Allen*, 34 F.4th 789, 796 (9th Cir. 2022). The court explained that depriving the public of visual access to criminal proceedings has "constitutional significance," because audio-only access deprives the listener of the ability to observe demeanor, body language, reactions, and visual exhibits. *Id.* at 798 & n.4. Accordingly, such a restriction on the public ability to observe criminal proceedings could only be justified by satisfying the four-part constitutional test required by *Waller v. Georgia*. *Id.* at 797-800.

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[3] The Supreme Court of Iowa has similarly applied the *Waller* factors to the use of a screen during the testimony of a minor victim. *See State v. Schultzen*, 522 N.W.2d 833, 836 (Iowa 1994) (holding that trial court's ruling "met the requirements of *Waller* and did not deny the defendant his right to a public trial by the screening of three family members").

### B. The Fifth and Eleventh Circuits Require Only a Substantial Reason to Justify a "Partial" Closure.

According to the Fifth Circuit, "the constitutionality of a district court's partial closure of a courtroom during a criminal trial" is measured by the single question of whether "the [district] court had a 'substantial reason' for partially closing [the] proceeding." *United States v. Ansari*, 48 F.4th 393, 402 (5th Cir. 2022) (holding that COVID-19 measure restricting public to overflow courtroom with both audio and video live-stream was supported by substantial reason); *accord United States v. Osborne*, 68 F.3d 94, 99 (5th Cir. 1995) (exclusion of defendant's sister and barring entrance of new spectators during single witness justified by substantial reason). The Eleventh Circuit has likewise held that "in the event of a partial closure, a court need merely find a 'substantial' reason for the partial closure, and need not satisfy the elements of the more rigorous *Waller* test." *Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001); *accord Douglas v. Wainwright*, 739 F.2d 531, 533 (11th Cir. 1984).

Although the Fifth Circuit stated in *Osborne* that its single-factor "substantial reason" test applicable to partial closures was aligned with decisions by all the other circuits that had addressed the question, *Osborne*, 68 F.3d at 98-99, aside from the Eleventh Circuit, other courts of appeals relax only the first factor and continue to apply *Waller*'s remaining requirements to "partial" closures. *See Woods v. Kuhlmann*, 977 F.2d 74, 77 (2d Cir. 1992) (replacing "overriding interest" with a "substantial reason," but otherwise requiring courts to satisfy "the remaining requirements of *Waller*"); *United States v. Simmons*, 797 F.3d 409, 414 (6th Cir. 2015) ("the 'overriding interest' requirement is replaced by requiring a showing of a 'substantial reason' for

a partial closure, but the other three factors remain the same."); *United States v. Sherlock*, 962 F.2d 1349, 1357-1359 (9th Cir. 1989) (holding that exclusion of defendant's family during testimony of complaining witness supported by adequate findings of substantial reason and was narrowly tailored after consideration of alternatives); *cf.* 18 U.S.C. § 3509(e) (authorizing exclusion of all "who do not have a direct interest in the case" during child testimony "if the court determines on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate" and the order is "narrowly tailored" to serve "the Government's specific compelling interest").

### C. The D.C. Court of Appeals, the Supreme Judicial Court of Massachusetts, and the Supreme Court of Ohio Hold That Restricting the Public Ability to Hear Proceedings Does Not Implicate the Sixth Amendment Right to Public Trial.

The D.C. Court of Appeals held that the use of a white noise device during voir dire "does not amount to a closure or partial closure of the courtroom, but is more appropriately viewed as an alternative to closure." *Blades v. United States*, 200 A.3d 230, 240 (D.C. 2019). The court noted that although the public could not hear the questioning, a "full or partial courtroom closure[]" for purposes of the right to a public trial occurs only when "some or all members of the public are precluded" from the courtroom such that they can "neither see nor hear what is going on." *Id.* at 239; *but cf. id.* at 249 (Beckwith, A.J., dissenting) (stating that majority does "not explain why limitations short of closing the courtroom door are not subject to the *Waller* test" and

noting split with the Sixth Circuit's ruling in *In re Petitions of Memphis Pub. Co.*, 887 F.2d 646 (6th Cir. 1989)).

The Supreme Judicial Court of Massachusetts has likewise held that conducting voir dire within the vision but outside the hearing of the public does not implicate the Sixth Amendment. "Although the public cannot hear what is being said," the court explained, "the ability to observe the process 'furthers the values that the public trial right is designed to protect.'" *Commonwealth v. Colon*, 121 N.E.3d 1157, 1170 (Mass. 2019).

The Supreme Court of Ohio also held in the context of traffic court that there was no "constitutional right" requiring the use of an audio system to permit the public to hear court proceedings. *State ex rel. Law Office of Montgomery Cty. Pub. Def. v. Rosencrans*, 856 N.E.2d 250, 255 (Ohio 2006) (per curiam). Three members of that court dissented on the ground that "[i]t is axiomatic that there is a constitutional right of the public *to hear* criminal proceedings." *Id.* at 259 (emphasis in original).

## III. The Question Presented Is Critically Important, and This Case Is an Ideal Vehicle to Resolve It.

Resolving the disarray amongst lower courts as to the constitutional standard that applies to "partial" limitations on the public's ability to see or understand criminal proceedings is of vital importance, particularly given the widespread restrictions on public access that were imposed due to the COVID-19 pandemic. *See, e.g.*, Jenia I. Turner, *Remote Criminal Justice*, 53 Tex. Tech L. Rev. 197, 230 (2021) (noting failure of some courts to accommodate public access to criminal proceedings during pandemic); *cf. Smith v. Titus*, 141 S. Ct. 982, 988 (2021) (Sotomayor, J.,

dissenting from denial of certiorari) (discussing trend toward "'creeping courtroom closure' in Minnesota trial courts"). This petition thus presents an ideal opportunity to address a straightforward legal question of exceptional importance that has divided lower courts: whether and how the *Waller* test applies to partial closures that restrict the public's ability to observe public criminal proceedings.

This case also cleanly presents the issue, on direct appeal in a federal criminal case, in which the trial court shielded admitted defense evidence at trial from the public based solely on broad and general grounds without considering alternatives or narrowly tailoring its ruling. Because the *Waller* test should be applied before courts impose restrictions on the public's ability to see or understand criminal proceedings subject to the Sixth Amendment public trial right, this Court should grant certiorari and reverse.

## CONCLUSION

For the reasons given above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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